Supreme Court, U.S.
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No. 90-893

In The

Supreme Court of the United States

October Term, 1990

STATE OF NEW MEXICO,

Petitioner,

v.

JOHN B. WORK,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of New Mexico

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The sole issue raised by Petitioner for the Court's consideration is whether a finding of presumptively prejudicial delay in a speedy trial claim shifts the burden of persuasion to the prosecution. Respondent addresses the following questions in response to the Petition and in support of his contention that the petition should be denied.

1. Whether the Petition should be denied as moot because Petitoner: (a) failed to take steps to prevent the entry of a final order from the state district court that dismissed the indictment with prejudice; and (b) failed to file notice of appeal from this final order within the time provided by state rules of appellate procedure?

2. Whether this Court should refuse to grant the Petition because the proceedings below do not clearly present the issue addressed by the Petition, and because, insofar as the position of a majority of the state supreme court on this issue may be ascertained, that position is consistent with the previous cases of this Court?

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Respondent John B. Work ("Respondent"), by and through counsel of record and in response to the request of this Court, hereby files his Brief in Opposition to the Petition for Writ of Certiorari Directed to the Supreme Court of the State of New Mexico that was filed by the State of New Mexico ("Petitioner") on December 5, 1990.

STATEMENT OF THE CASE

Although Petitioner's Statement of the Case does not actively misrepresent the facts below, Petitioner's Statement, nonetheless, is incomplete. Following the issuance of its opinion on September 6, 1990, the New Mexico Supreme Court entered an order reversing the decision of the New Mexico Court of Appeals and remanding this case to the trial court with instructions to dismiss the indictment with prejudice. No motion for rehearing was filed in the case. *See* Appendix A. Nor did Petitioner seek a stay or recall of the state supreme court's order pending application to this Honorable Court for a Writ of Certiorari as provided by state appellate rules. *See* SCRA 1986, Rule 12-402(E), contained in Appendix B.

On October 17, 1990, pursuant to the supreme court order, the mandate of the Court of Appeals of the State of New Mexico issued to the district court for further proceedings consistent with the supreme court opinion. *See* Appendix C. Again, no attempt was made to stay or recall the mandate of the court of appeals. On November 16, 1990, pursuant to the order and mandate of the state appellate courts, the district court entered an order dismissing the indictment with prejudice. *See* Appendix D.

Petitioner also failed to file a timely notice of appeal from this final order with the district court as required to secure appellate review under state appellate rules. *See* SCRA 1986, Rules 12-201, -202, attached in Appendix E.

SUMMARY OF THE ARGUMENT

Respondent requests this Honorable Court to dismiss the Petition of the State of New Mexico as moot. Under independent and adequate grounds of state law, the New Mexico Supreme Court lost jurisdiction to act once the district court entered its order in compliance with the mandate of the court of appeals. Moreover, under state appellate rules, the time for seeking appeal of the final order of the district court long since has passed. Any order by this Court directed to the state supreme court therefore could have no affect on the proceedings that gave rise to the Petition, because under state law the state supreme court cannot itself act. Thus, the Petition should be dismissed as moot.

Without abandoning the above argument, Respondent also contends that even if this Court has jurisdiction, in the exercise of its discretion the Court should refuse to grant the Petition. First, the position ascribed by Petitioner to a majority of the state supreme court was in fact a plurality and not a majority position. The conflict between the analyses employed by the plurality and concurring opinions presents issues other than those to which Petitioner draws attention.

This fact renders problematic Petitioner's characterization of the effect of the lower court's application of a

presumption of prejudice. In the event that this Court wishes to address the issue raised, it should await the presentation of a case in which the application of a presumption of prejudice truly is outcome determinative. A grant of certiorari in the present case would require first that the Court sort through numerous, unrelated, preliminary issues before it could reach the issue raised by Petitioner.

The plurality and concurring opinions clearly share in common certain basic concepts; for example, both apply a presumption of prejudice to speedy trial claims subsequent to a defendant's *prima facie* showing of undue delay. However, it should be noted that the opinion below represents only the second case in which the New Mexico Supreme Court has recognized the existence of such a presumption. *See also Zurla v. State*, 109 N.M. 640, 789 P.2d 588 (1990). The apparent disagreement within the state court concerning the appropriate application of these basic concepts thus demonstrates that court's continuing development and refinement of its speedy trial jurisprudence. The lower court's continuing development of the analytic framework attacked by Petitioner, and the resolution of conflicts within that court, will provide this Court (if and when it ultimately decides the question presented) the benefit of the lower court's accruing experience in applying these legal principles to a wide range of factual situations.

Finally, Respondent submits that the principles advanced in the plurality opinion and shared by the concurrence do not conflict with the cases of this Court that are relied upon by Petitioner. Rather, these principles accord fully with the concepts developed by this Court in

determining whether a defendant's sixth amendment right to a speedy trial has been violated.

THE ARGUMENT

1. Under Grounds of Independent and Adequate State Law, This Petition Should Be Dismissed as Moot.

Article III of the United States Constitution limits the judicial power of the federal courts to the adjudication of actual, ongoing controversies. *See Deakins v. Monaghan*, 484 U.S. 193, 108 S. Ct. 523 (1988). As this Court has stated succinctly, "It is not enough that a controversy existed at the time the complaint was filed, and continued to exist when review was obtained in the [appellate court below]." *Id.* at 528; *see also Honig v. Doe*, 484 U.S. 305, 108 S. Ct. 592, 601 (1988). As the Court declared long ago:

> The duty of this Court . . . is to decide actual controversies by judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from a judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this Court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the Court will not proceed to formal judgment but will dismiss the appeal.

Mills v. Green, 159 U.S. 651, 653 (1895). In *California v. San Pablo & Tulare R. Co.*, 149 U.S. 308, 314 (1894), Justice Gray

wrote that the Court "is not empowered to decide questions . . . or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing at issue in the case before it. No stipulation of parties or counsel . . . can enlarge the power, or affect the duty, of the Court in this regard."

Moreover, this Court long has declined to interfere with the legitimate operation of state appellate rules. As stated by the Court in *Wolfe v. North Carolina*, 364 U.S. 177 (1960):

> Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and timing of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when federal rights are in controversy than when the case turns entirely upon questions of local or general law.

Id. at 195 (quoting *John v. Puillin*, 231 U.S. 583, 585 (1913)). *See also Michigan v. Tyler*, 436 U.S. 499 (1978) (failure to present federal question in conformity with state procedural rules constitutes an independent and adequate grounds for the decision below and bars Supreme Court review, so long as state has legitimate interest in the enforcement of said rule); *Wainwright v. Sykes*, 433 U.S. 72 (1977) (failure to timely object to admission of confession under state law precluded direct review by Supreme Court); *Moss v. Ramsey*, 239 U.S. 538 (1916) (whether state appellate court could correct its interlocutory decision upon first appeal is a question of local law as to which state decision controls).

In the case below, Petitioner did not seek to avail itself of the procedure provided under state law to stay the mandate. SCRA 1986, Rule 12-402(E), provides for "a stay or recall of a mandate pending . . . application to the United States Supreme Court for a writ of certiorari . . . upon motion." The Rule also provides that upon notice from the Clerk of the Supreme Court confirming the filing of a petition for the writ, a stay granted under Rule 12-402(E) "shall continue until final disposition."

A period of over two months transpired in this case between the issuance of the opinion of the New Mexico Supreme Court and the entry of the order by the trial court dismissing the indictment with prejudice. Petitioner took no action, either in the appellate courts of the State of New Mexico, or before this Court,[1] to preserve the federal issue raised in its Petition for Writ of Certiorari. Petitioner did not seek to prevent the district court from acting on the mandate; nor did it file a notice of appeal within thirty days following dismissal of the indictment by the district court. *See* SCRA 1986, Rule 12-201(A) (notice of appeal shall be filed within thirty (30) days after filing of a judgment or order from which appeal is taken). Under New Mexico law, timely filing of a notice of appeal is jurisdictional. *See Public Serv. Co. v. Wolfe*, 78 N.M. 221, 430 P.2d 379 (1967). The New Mexico Supreme Court has held the time limitation on appeals contained in the appropriate rules is not affected by the constitutional right to appeal contained in the New Mexico

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[1] *See* Supreme Court Rule 23.

Constitution. *See State v. Garlick*, 80 N.M. 353, 456 P.2d 185 (1969).

Clearly, Petitioner did not make even a minimal effort to preserve the status quo below when it decided to seek a writ of certiorari from this Court. The state procedural rules on their face certainly provide ample opportunity for the preservation of federal issues that litigants wish to bring before the Court. Nor is there any indication that New Mexico's appellate court's fail to enforce these rules uniformly, or that the application of these rules in this case would constitute a machination to avoid the issuance of a mandate by this Court. *See Hathorn v. Lovorn*, 457 U.S. 255 (1982) (state procedural ground not "adequate" unless procedural rule is strictly or regularly enforced); *Wolfe*, 364 U.S. at 195 (Supreme Court will accept decision of state court premised on state appellate rules of procedure unless invocation of state rules is ploy to avoid federal constitutional issue).

In fact, given Petitioner's utter failure to pursue the means of preserving its claim that were available to it under state (or federal) law, Respondent submits that the issue of the *adequacy* of New Mexico's procedural rules is not properly before the Court. The *effect* of the state's failure to stay the mandate or appeal the order dismissing the indictment, on the other hand, is before the Court, and requires the dismissal of the Petition. Clearly, under independent grounds of state law the Petition is now moot.

In *Woodson v. Lee*, 74 N.M. 227, 392 P.2d 419 (1964), the New Mexico Supreme Court held that, once the district court took action upon its mandate following

remand, the supreme court lacked jurisdiction to stay or recall the mandate. *See also, Hayes v. Reeves*, 91 N.M. 174, 571 P.2d 1177 (1977) (Supreme Court had jurisdiction to recall mandate of court of appeals before it was filed with the district court). Under the authority cited above, moreover, New Mexico appellate courts have no jurisdiction to modify the operation of the district court's order dismissing the indictment with prejudice, as the state failed to file notice of appeal within the required thirty-day period.[2]

Therefore, the issuance of process by this Court directed to the Supreme Court of the State of New Mexico could have no affect on the proceedings below. Under the

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[2] The Court has held in the past that its jurisdiction was not defeated by the prosecution's voluntary dismissal of an indictment upon remand of a case from a *federal* court of appeals to a *federal* district court. However, this holding was based on principles of *federal* appellate procedure. *See United States v. Villamonte Marquez*, 462 U.S. 579, 581, n.2 (1983); *see also Carr v. Zaja*, 283 U.S. 52 (1931), *cited with approval in Villamonte-Marquez*, 462 U.S. at 581 n.2. Moreover, other opinions of this Court, in contrast to *Villamonte-Marquez*, appear to treat the stay of the mandate as a decisive question in deciding whether a petition for a writ of certiorari was moot. *See Warden, Lewisberg Penitentiary v. Marrero*, 417 U.S. 653, 655 (1974) (when mandate was issued before Circuit Justice granted stay, stay was treated as staying all proceedings under the mandate, and respondent's motion to dismiss as moot was therefore denied); *Wise v. Lipscomb*, 434 U.S. 1327 (1977) (Powell, Circuit Justice) (unless mandate of court of appeals was recalled and judgment stayed, actions by respondents upon effectuation of mandate would probably moot issues in appeal); *see also Villamonte-Marquez*, 462 U.S. at 594-599 (Brennan, J., joined by Marshall and Stevens, J.J., dissenting). In any event, these cases are not controlling here.

mootness doctrine as well as under the principles of federalism contained in the independent-and-adequate-state-grounds doctrine, Respondent respectfully submits the Court should dismiss the Petition. *Cf. Burke v. Barnes*, 479 U.S. 361 (1987) (challenge to act of Congress was moot by the time it reached Supreme Court when, by the terms of the act, it already had expired).[3]

2. If The Court Determines The Petition For Writ Of Certiorari Is Not Moot, The Court Nonetheless Should Exercise Its Discretion Not To Hear This Case.

The State represents in its Petition that the New Mexico Supreme Court and the New Mexico Court of Appeals differed only in the approach used to analyze the material facts of the case. *See*, Petition at 8. From this representation, the State concludes that "the same facts can easily lead to different results, depending upon which approach is used to resolve the presence or absence of prejudice in a speedy trial claim." *Id.* Although the plurality opinion written by Justice Montgomery did assume the same basic facts as utilized by the court of appeals, the concurring opinion of Justice Ransom clearly found this analysis unconvincing. Noting that the allegations of prejudice advanced by Respondent at the trial

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[3] In the event the Court should decide that the previous New Mexico precedent leaves any doubt concerning the lack of jurisdiction on the part of the state supreme court, in the interests of judicial economy and comity Respondent suggests that the Court remand this case for a decision from the state supreme court regarding any questions of state law that may prove dispositive of the Petition.

court related to the fifteen-month period during which formal charges were not pending, Justice Ransom found any presumption of prejudice attaching to the thirteen-month period during which formal charges *were* pending to be "entitled to little weight." *See*, Petition, Appendix A at 9. The concurring opinion concluded a speedy trial violation had taken place by relying upon a long line of federal cases which hold that, when the prosecution has dismissed formal charges in bad faith and for tactical reasons, "substance rules over form" and such dismissal does not stop the running of the speedy trial right. *Id.* at 10-11; *see also United States v. Laura*, 520 F.2d 460 (D.C. Cir. 1975); *State v. McCrary*, 100 N.M. 671, 675 P.2d 120 (1984). Based upon the inclusion of the fifteen-month period of time between the dismissal of the magistrate court charges and Respondent's indictment in the district court, the concurring opinion calculated a total period of delay of twenty-eight months.

The concurrence then reanalyzed the case, noting first that the presumption of prejudice as applied to the record became considerably stronger when the full twenty-eight-month period was included. Not only did the length of delay itself more than double, the allegations of prejudice contained in Respondent's Motion to Dismiss related directly to the twenty-eight-month period of delay under consideration. In addition, the concurring opinion balanced the fifteen-month period of tactical delay with the thirteen-month period of delay considered by the plurality opinion (and by the court of appeals) and concluded that the reasons of delay weighed substantially against Petitioner rather than slightly in its favor.

See id, at 13. Thus, to the concurrence, it was the calculation of the relevant period of delay rather that the application of a presumption of prejudice *per se* that was decisive.[4] It is worth noting that Petitioner raises no argument concerning the validity of the analysis contained in the concurring opinion. Nor does Petitioner cite the existence of disagreement between jurisdictions on the question of tactical dismissal which this Court should resolve by formal opinion.

The disagreement within the New Mexico Supreme Court demonstrates that this was not a case in which the application of a presumption of prejudice arising from undue delay *itself* necessarily determined the outcome. More precisely, the opinion below demonstrates that the concept of prejudicial delay as applied by the appellate courts of New Mexico still is in the process of evolving. True, to the plurality this concept implicated a different outcome that than the one reached by the Court of Appeals, notwithstanding the plurality's assumption of the same factual predicates; however, to the concurrence, the factual predicates themselves rather than the conceptual framework were determinative.

This case thus fails to present a definitive "approach" to which this Court's opinion could address itself. If resolution of the issue as framed by Petitioner interests the Court, Respondent submits that this case is not the case in which to pursue that interest. In fact, this Court's

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[4] Indeed, given the weights assigned by the concurring opinion to length of delay and reasons for the delay, application of a presumption of prejudice arising from the delay itself may have been surplusage.

exercise of its discretion to refuse to hear the present case may facilitate its eventual development of a definitive statement when a more propitious case does arise. The New Mexico Supreme Court's exploration of these concepts clearly is in a state of flux, and the outcome of the experiment presently being undertaken in New Mexico may benefit this Court if and when it does address the issue raised by Petitioner.

Finally, Respondent submits, contrary to Petitioner's assertions, neither *Barker v. Wingo*, 407 U.S. 514 (1972), *United States v. Loud Hawk*, 474 U.S. 302 (1986), nor any other case of this Court of which counsel is aware conflicts with the basic approach taken by the plurality opinion below. The determinative question in *Barker* was not whether the defendant was prejudiced by the delay. Rather, in *Barker* this Court held that the defendant's right to a speedy trial was not violated *despite* the existence of some prejudice to the defendant, because the defendant in that case purposefully delayed his own trial hoping for a favorable resolution of the charges against a co-defendant. *See*, 407 U.S. at 534-536. In *United States v. Loud Hawk*, the Court did not find that a "possibility" of prejudice was insufficient to carry the prejudice prong of the analysis; rather, the Court found the possibility of prejudice presented by "some" diminution of the memories of key defense witnesses insufficient to tip the overall balance of the *Barker* test and give rise to a speedy trial violation. *See* 474 U.S. at 315.

Moreover, the concept of a "possibility" of prejudice must itself be understood in light of this Court's previous cases. In *Smith v. Hooey*, 393 U.S. 374, 378 (1969), the

Court held the *possibility* of the loss of concurrent sentencing constituted an aspect of oppressive pre-trial incarceration. *See also Zurla*, 109 N.M. at 645, 789 P.2d at 593 (relying on *Smith v. Hooey*). As noted by Justice Montgomery below in his plurality opinion:

> If neither party comes forward with facts, the 'probability of prejudice' (*see Dickey v. Florida*, 398 U.S. 30, 56 (1970) (Brennan J., concurring)) will remain just that - a probability; but it may have greater or lesser significance in the balancing process, depending on the length of the delay and the weights assigned to the other factors.

Petition, Appendix A at 7 (footnote omitted).

While the State correctly notes the influence of Justice Brennan's concurring opinion in *Dickey v. Florida* on jurisdictions that apply a presumption of prejudice following a defendant's *prima facie* showing of inordinate delay, this influence is not merely a matter of historical coincidence. In *Barker v. Wingo*, the Court noted that "in essence . . . there is little difference between [Justice Brennan's] approach [in *Dickey*] and the one we adopt today." 407 U.S. at 530, n.30. Indeed, the *Barker* Court's denomination of inordinate delay as "presumptively prejudicial delay" further attests to the congruence between its analysis and that of Justice Brennan in *Dickey*. As noted previously by the New Mexico Supreme Court, this analytic framework also comports with

> general principles regarding [the adjudication of] claims of prejudice to a criminal defendant's constitutional rights. *See Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (when defendant raises reasonable possibility of

> constitutional error affecting verdict, presumption of prejudice arises that state must rebut beyond a reasonable doubt); *Manlove v. Sullivan*, 108 N.M. 471, 775 P.2d 237 (1989) (same burden when error affects appeal). We believe to apply a different rule to speedy trial claims would place an inappropriate burden on a criminal defendant in a system that "places the primary burden on the courts and prosecutor's to assure that cases are brought to trial."

Zurla, 109 N.M. at 646, 789 P.2d at 594 (quoting *Barker v. Wingo*, 407 U.S. at 529). As noted by the *Zurla* court, *id.*, n.4, a presumption of prejudice has been applied in other sixth amendment contexts. *See, e.g., Satterwhite v. Texas*, 486 U.S. 249 (1988); *see also Nix v. Williams*, 467 U.S. 431 (1984); *see generally* C. Wright, 3A *Federal Practice and Procedure (Criminal)* §§ 854-55 (2d Ed. 1982).

The *Barker* Court's thinking concerning this concept is amplified further by the concurring opinion of Justices Brennan and White in that case, in which they acknowledged that prejudice is

> inevitably present in every case to some extent, for every defendant will either be incarcerated pending trial or on bail subject to substantial restrictions on his liberty. It is also true that many defendants will believe that time is on their side and will prefer to suffer whatever disadvantages delay may entail. But, for those who desire an early trial, these personal factors should prevail if the only countervailing considerations offered by the State are those connected with crowded dockets and prosecutorial case loads.

See 407 U.S. at 537-38, *quoted in Zurla*, 109 N.M. at 596, 789 P.2d at 648. As made clear by both by the Court's opinion

in *Barker v. Wingo* and by the occurring opinion of Justices White and Brennan in that case, of greater importance in most speedy trial cases than the existence of prejudice to the defendant are the factors of the length of the delay, the reason for the delay, and the assertion of the right. *Id.* It is in this sense that the Court adopted a balancing test which weighed the behavior of the state and the defendant against one another. *See* 407 U.S. at 530-533. As stated in the plurality opinion of Justice Montgomery below:

> The Supreme Court made it clear that none of these factors is either a necessary or a sufficient condition to a finding that there has been a deprivation of the right to a speedy trial; none of them has any "talismanic quality," and each can be assigned different significance or different weight in "the difficult and sensitive balancing process" that must take place in deciding whether the right has been violated. *See Barker*, 407 U.S. at 533. Because no factor is indispensable to a finding of a violation and because each must be evaluated on a spectrum of significance, it is a mistake to think that a simple finding of, for example, "prejudice," or "no prejudice" will suffice to resolve the issue and can be made by assigning the "burden of proof" to one party or another. *See Moore v. Arizona*, 414 U.S. 25 (1973).

See Petition, Appendix A at 6.

Respondent agrees that "presumptively prejudicial delay" is necessary to trigger the speedy trial analysis and serves the worthwhile function of screening frivolous claims. Respondent submits, however, given the language of *Barker*, the previous cases of this Court regarding the sixth amendment right to a speedy trial, and the general law regarding adjudication of claims of constitutional

error in criminal proceedings, that a showing of presumptively prejudicial delay should not be treated simply as a "triggering mechanism." When the government has delayed too long without just cause or excuse in its prosecution, basic concepts of fairness support placing the risk of nonpersuasion on the government to show that, *on balance*, a defendant's fundamental right to a speedy trial was not thereby violated. Respondent notes, relative to claims of impairment to the defense in particular, the inequity of requiring the defendant to prove with undue exactitude the parameters of that evidence which, by definition, has been lost, degraded, or destroyed because of the delay.

Finally, Respondent disputes the allegation made by Petitioner that recognition of a presumption of prejudice is bad policy because it would require the prosecution to "prove a negative" without knowing what the defense will be. *See* Petition at 10-11. New Mexico's rules of criminal procedure for the district courts provide that:

> If an evidentiary hearing is required, the motion shall be accompanied by a separate written request for an evidentiary hearing, including a statement of the ultimate facts intended to be proven at such an evidentiary hearing. Unless a shorter period of time is ordered by the court, at least five (5) days prior to the hearing on the motion, each party shall submit to the other party's attorney the names and addresses of the witnesses the party intends to call at the evidentiary hearing, together with any statement made by the witness which has not been previously disclosed pursuant to Rule 5-501 or 5-502.

SCRA 1986, Rule 5-601(E). See Appendix F, *infra*.

Clearly, under the presumption of prejudice arising from undue delay as conceptualized by the New Mexico Supreme Court, it is the defendant who raises a speedy trial claim who must move for an evidentiary hearing. Until the defendant establishes at the hearing on his motion the existence of presumptively prejudicial delay, he still would bear the burden of proof. Under Rule 5-601(E), therefore, the defendant must allege in his motion the facts to be proven at the hearing. If the defendant fails to present specific allegations of prejudice in his motion for a hearing, the prosecution undoubtedly would have available to it auxiliary mechanisms to compel a more definite statement or to preclude the defendant from raising matters not alleged in the motion later at the evidentiary hearing. Given notice of the allegations of prejudice by the defendant, nothing prevents the prosecution from gathering the circumstantial evidence necessary to rebut any of the allegations which, if unrebutted, would constitute an aspect of prejudice under the sixth amendment right to a speedy trial.[5]

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[5] Admittedly, the foregoing procedural analysis relies in part on the operation of rules of state criminal procedure and not simply on principles of federal law. However, an understanding of the operation of these rules is necessary to understand why the policy argument advanced by the state is unsound. Should this Court conclude that these preliminary questions of state law are critical to its resolution of this case on the merits, Respondent respectfully requests this case be remanded to the New Mexico Supreme Court for determination of procedural issues involved.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests the Court to dismiss the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX "A"

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
Monday, September 24, 1990

NO. 18,626

JOHN B. WORK,

Petitioner,

vs.

STATE OF NEW MEXICO,

Respondent.

This cause having heretofore been submitted and taken under advisement, and on September 6, 1990, an opinion having been handed down and judgment entered reversing the decision of the Court of Appeals and remanding to the trial court with instructions to dismiss the indictment with prejudice, and no motion for rehearing having been filed;

NOW, THEREFORE, IT IS ORDERED that the judgment entered herein on September 6, 1990 is hereby made final.

IT IS FURTHER ORDERED that the Record in Cause No. 11016 is hereby returned to the Clerk of the Court of Appeals.

APPENDIX "B"

12-402. Issuance and stay of mandate.

A. **Entry of disposition.** Writings evidencing disposition by the appellate court shall be filed with the appellate court clerk and such filing constitutes entry thereof.

B. **Supreme court.** Unless otherwise ordered, mandate shall not issue until expiration of fifteen (15) days after entry of disposition of the proceedings and, if timely motion for rehearing is filed, then upon disposition of such motion for rehearing.

C. **Court of appeals.** Mandate from the court of appeals shall not issue until the time has elapsed for seeking certiorari in the supreme court. If certiorari is sought, mandate shall not issue until final disposition of the application for the writ or, if the writ is granted, until final action on the cause by the supreme court. For good cause shown, the court of appeals may recall its mandate within ten (10) days of issuance thereof.

D. **Stipulated mandate.** Upon stipulation of the parties, mandate or other process may issue prior to the time or times above specified.

E. **Stay of mandate pending appeal or application for certiorari in the United States Supreme Court.** A stay or recall of the mandate pending appeal or application to the United States Supreme Court for a writ of certiorari may be granted upon motion. The stay shall not exceed sixty (60) days unless the period is extended for cause shown. If during the period of the stay there is filed with the appellate court clerk a notice from the clerk of the United States Supreme Court that the party who has

obtained the stay has filed an appeal or a petition for the writ in that court, the stay shall continue until final disposition. Upon the filing of a copy of an order denying the petition for writ of certiorari or dismissing the appeal, or a judgment affirming the decision of the court, the mandate shall issue immediately. If the petition for writ of certiorari seeks review of a decision of the court of appeals, and if the court of appeals has denied a stay or recall of mandate under this paragraph, the petitioner may obtain review of the court of appeals' action in the supreme court by filing a motion in the supreme court within ten (10) days of the court of appeals' denial.

APPENDIX "C"

In the Court of Appeals of the State of New Mexico

NO. 11,016

STATE OF NEW MEXICO, 90 OCT 17

v. SANTA FE County

JOHN B. WORK No. SF-87-672(CR)

MANDATE TO DISTRICT COURT CLERK

(Applicable items are indicated by an "X" below.)

1. ____ Attached is a true and correct copy of the original decision entered in the above-entitled cause.

2. ____ This decision being now final, the cause is remanded to you for any further proceedings consistent with said decision.

3. X Writ of Certiorari having been issued by the New Mexico Supreme Court and their decision now being final, this cause is remanded to you for any further proceedings consistent with said Supreme Court decision attached hereto.

4. ____ You are directed to issue any commitment necessary for the execution of your judgment and sentence.

5. ____ District Court Clerk's Record returned herewith.

6. X Exhibits filed herein shall be picked up at this Clerk's Office forthwith. (Tapes (3 w/logs), Exhibits (1 env))

7. ____ Cost Bill is assessed as follows:

By direction of and in the name of the Chief Judge of the Court of Appeals, this 15th day of October, 1990

(SEAL)
cc: Counsel

Patricia C. Manzanares
Clerk of the Court of Appeals
of the State of New Mexico.

APPENDIX "D"

FIRST JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

90 NOV 16

SF 87-672 (CR)

STATE OF NEW MEXICO,

Plaintiff,

v.

JOHN B. WORK,

Defendant.

THIS MATTER having come before the Court upon the mandate of the Court of Appeals following issuance of a writ of certiorari by the New Mexico Supreme Court pursuant to which the decision of the Court of Appeals was reversed by the New Mexico Supreme Court and the decision of this Court to grant defendant's motion to dismiss having been thereby affirmed.

IT IS THEREFORE ORDERED that the indictment previously filed in this cause is hereby dismissed with prejudice.

Art Encinias
Art Encinias
District Judge

SUBMITTED BY:

Mark H. Donatelli
Attorney for Defendant

APPROVED BY:

Henry P. Valdez
Henry Valdez
Deputy District Attorney

DMHD.141

APPENDIX "E"

12-201. Appeal as of right; when taken.

A. **Filing notice.** The notice of appeals shall be filed within thirty (30) days after the filing of the judgment or order appealed from. The three (3) day mailing period set forth in Rule 12-308 does not apply to the time limits set forth above. A notice of appeal filed after the announcement of a decision, or return of the verdict, but before filing of the judgment or order shall be treated as filed after such filing and on the day thereof. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within ten (10) days after the date on which the first notice of appeal was served or within the time otherwise prescribed by this rule, whichever period last expires.

B. **Cross-appeals.** If more than one party files a notice of appeal, the party to file the first notice of appeal shall be deemed the appellant, and any opposing party filing a notice of appeal shall be a cross-appellant, unless the court orders otherwise.

C. **Review without cross-appeal.** An appellee may, without taking a cross-appeal or filing a docketing statement, raise issues on appeal for the purpose of enabling the appellate court to affirm, or raise issues for determination only if the appellate court should reverse, in whole or in part, the judgment or order appealed from.

D. **Post-trial motions.** The filing of a post-trial motion, including a motion for new trial, shall not extend the time limits for filing a notice of appeal.

E. **Extensions of time.**

(1) Before the time for filing a notice of appeal has expired, upon a showing of good cause, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed thirty (30) days from the expiration of the time otherwise prescribed by this rule.

(2) After the time has expired for filing a notice of appeal, upon a showing of excusable neglect or circumstances beyond the control of the appellant, the district court may extend the time for filing a notice of appeal by any party for a period not to exceed thirty (30) days from the expiration of time otherwise provided by this rule, but it shall be made upon motion and notice to all parties.

(3) The district court retains jurisdiction to rule on a motion for extension of time to file the notice of appeal regardless of whether the notice of appeal has been filed.

(4) No motion for extension of time to file the notice of appeal may be granted after sixty (60) days, from the time the appealable order is entered. If the motion is not granted within the sixty (60) days, the motion is automatically denied.

(5) If a post-trial motion for new trial or a post-trial motion which attacks the judgment, verdict or findings of fact is not granted within thirty (30) days from the date it is filed, it shall be deemed automatically denied.

(6) In computing time, pursuant to this paragraph, the three (3) day mailing period set forth in Rule 12-308 does not apply.

(7) Any party obtaining an order extending the time to file an appeal shall promptly serve notice of the order in accordance with Rule 12-307.

[As amended, effective July 1, 1990.]

* * *

12-202. Appeal as of right; how taken.

A. **Filing the notice of appeal.** An appeal permitted by law as of right from the district court shall be taken by filing a notice of appeal with the district court clerk within the time allowed by Rule 12-201.

B. **Content of the notice of appeal.** The notice of appeal shall specify:

(1) each party taking the appeal;

(2) each party against whom the appeal is taken;

(3) the name and address of appellate counsel if different from the person filing the notice of appeal; and

(4) the name of the court to which the appeal is taken.

A copy of the judgment or order appealed from, showing the date of the judgment or order, shall be attached to the notice of appeal.

C. **Additional requirements for appeals in criminal cases.** In addition to the requirements set forth in Paragraph B, the following are required, when applicable, with a notice of appeal in criminal cases:

(1) A notice of appeal by the state under NMSA 1978, § 39-3-3B(2) shall also include the certificate of the district attorney required by the statute; and

(2) If the notice of appeal names the appellate division of the public defender department as appellate counsel, a copy of the order appointing the appellate division of the public defender department shall be attached to the notice of appeal.

D. **Service of the notice of appeal.** The appellant shall give notice of the filing of a notice of appeal:

(1) in criminal cases, including criminal contempt cases, and cases governed by the Children's Court Rules, by serving a copy on the appellate court, appellate division of the attorney general, appellate division of the public defender, trial judge, trial counsel of record for each party other than the appellant, and the tape monitor or court reporter who took the record;

(2) in child abuse and neglect proceedings and proceedings involving the termination of parental rights, in addition to those required in Subparagraph (1) of this paragraph, by serving a copy on the Legal Services Bureau of the Human Services Department; and

(3) in all other cases, by serving a copy on the appellate court, trial judge, tape monitor or court reporter who took the record and trial counsel of record for each party other than the appellant.

E. **Service on party.** If a party is not represented by counsel, service shall be made by mailing a copy of the notice of appeal to the party at his last known address.

F. **Joint or consolidated appeals.**

(1) If two or more persons are entitled to appeal from a judgment or order and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in an appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant.

(2) Appeals may be consolidated by order of the appellate court upon its own motion or upon motion of a party, or by stipulation of the parties.

APPENDIX "F"

5-601. Pretrial motions, defenses and objections.

A. **Change of venue.** Change of venue shall be accomplished according to law.

B. **Defenses and objections which may be raised.** Any defense, objection or request which is capable of determination without a trial on the merits may be raised before trial by motion.

C. **Defenses and objections which must be raised.** The following defenses or objections must be raised prior to trial:

(1) defenses and objections based on defects in the initiation of the prosecution; or

(2) defenses and objections based on defects in the complaint, indictment or information other than a failure to show jurisdiction in the court or to charge an offense, which objections shall be noticed by the court at any time during the pendency of the proceedings. Failure to present any such defense or objection, other than the failure to show jurisdiction or charge an offense, constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. If any such objection or defense is sustained and is not otherwise remediable, the court shall order the complaint, indictment or information dismissed.

D. **Time for making motions.** All motions, unless otherwise provided by these rules or unless otherwise ordered by the court, shall be made at the arraignment or within twenty (20) days thereafter, unless upon good cause shown the court waives the time requirement.

E. **Evidentiary hearing.** If an evidentiary hearing is required, the motion shall be accompanied by a separate written request for an evidentiary hearing, including a statement of the ultimate facts intended to be proven at such an evidentiary hearing. Unless a shorter period of time is ordered by the court, at least five (5) days prior to the hearing on the motion, each party shall submit to the other party's attorney the names and addresses of the witnesses the party intends to call at the evidentiary hearing, together with any statement made by the witness which has not been previously disclosed pursuant to Rule 5-501 or 5-502.

F. **Ruling of court.** All motions shall be disposed of within a reasonable time after filing. All motions not ruled upon within thirty (30) days after filing shall be deemed denied.

G. **Defenses and objections not waived.** No defense or objection shall be waived by not being raised or made before entering a plea.